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NOTES.

PROBLEMS IN REAL PROPERTY LAW RAISED BY THE INHERITANCE TAX.—As a result of the wide-spread adoption by the States of laws taxing property passing by will or statutes of descent and distribution, the courts have been called upon to decide a great number of questions arising from such legislation. Since the statutes vary from each other in greater or less degree, and since the United States Supreme Court has no power of review, the results are by no means harmonious.[1] The diversity of decisions has been increased particularly, where this progressive legislation has necessitated the interpretation of common law principles of real property.

The courts have experienced considerable difficulty in this respect, in determining the applicability of these taxes to the wife's right of

[1]The question whether certain property interests have been correctly included in the taxable lists is one for the state courts. Moffitt *v.* Kelly (1910) 218 U. S. 400.

Different names are given the tax such as transfer tax, inheritance tax, succession tax, etc., but they are all based on the same theory. See an article by J. M. Kerr, 71 Cent. L. J. 75. For an excellent criticism of the theory see an article by L. H. Beers, 14 Columbia Law Rev., 229.

dower. This is due in a large measure to the peculiar nature and qualities of the estate. It is said to be an inchoate right during coverture which becomes consummate upon the death of the husband.[2] At this point of time, however, the widow has only a chose in action, and not a vested estate in the land.[3] Her title of dower is perfect but her title of entry does not accrue until the heir has assigned her portion in certainty. When this is done her title relates back to the death of her husband and is considered as a continuation of his estate, although in point of tenure she holds of the heir.[4] This unique and peculiar position of the widow has apparently confused at least one court and led it to decide that dower is inherited and thus subject to the inheritance tax.[5] The weight of authority, however, is represented by the recent case of *In re Bullens' Estate* (Utah 1915) 151 Pac. 533, which holds that since dower passes to the widow as of her own right by purchase and not by succession, she is immune from the tax.[6]

Even though it be admitted that in claims of dower the tax is not assessable, a further problem arises in cases where the widow elects to take under the provisions in the will in lieu of dower. Some jurisdictions hold that having voluntarily renounced her own property rights, she is subject to the laws governing the instrument under which she takes and must therefore pay the tax.[7] On the other hand, it has been held that, since the husband cannot by will defeat the wife's dower, the devise is merely an expeditious way of giving her what she is entitled to by law, and accordingly is not taxable.[8] When the estate in lieu of dower comes to the wife as the result of an ante-nuptial contract, there is to be found further disagreement among the courts. Some construe such agreements as testamentary in character, and hold that the State is entitled to the tax.[9] Others arrive at the opposite conclusion for the reason that they consider the death of the husband as a mere incident to a valid contract *inter vivos*.[10] The New York courts have decided that curtesy comes under the same principles as dower within the

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[2]The inchoate right of dower has been termed a mere possibility. See Randall *v.* Kreiger (1874) 90 U. S. 137. But nevertheless, it amounts to an incumbrance against the estate within the meaning of covenants against incumbrances, Shearer *v.* Ranger (1839) 39 Mass. 447; Fitts *v.* Hoitt (1845) 17 N. H. 530; and one which the law protects from prejudicial acts of the husband. Bonfoey *v.* Bonfoey (1894) 100 Mich. 82.

[3]Wade *v.* Miller (1867) 32 N. J. L. 297.

[4]4 Kent, Comm., *62; 2 Scribner, Dower (2d ed.) 772; 1 Washburn, Real Property (6th ed.) 261.

[5]Billings *v.* People (1901) 189 Ill. 472.

[6]*In re* Weilers' Estate (1910) 122 N. Y. S. 608, aff'd. 139 App. Div. 905; *In re* Shields' Estate (N. Y. 1910) 68 Misc. 264; Crenshaw *v.* Moore (1911) 124 Tenn. 528; Commonwealth's Appeal (1859) 34 Pa. 204; *In re* Estate of Strahan (1913) 93 Neb. 828. The last case is not one of dower but an estate created by statute to replace dower.

[7]*In re* Riemann's Estate (N. Y. 1904) 42 Misc. 648.

[8]*In re* Estate of Sanford (1912) 91 Neb. 752, reversing the former holding in the same case in 90 Neb. 410. In the latter case, it was argued in a forceful dissenting opinion that only the amount in excess of dower should be taxed. *Cf.* Small's Estate (1891) 11 Pa. Co. Ct. 1.

[9]People *v.* Estate of Field (1910) 248 Ill. 147.

[10]*In re* Baker's Estate (N. Y. 1902) 38 Misc. 151; see 11 Columbia Law Rev., 486.

meaning of the transfer tax.[11] This result is due to an apparent misapprehension concerning the vital distinctions, recognized at common law, between dower and curtesy. Curtesy was always regarded as devolving upon the husband as does the estate of an ancestor upon the heir. Consequently from this point of view the estate is one of descent rather than purchase.[12] This error of the court was, however, subsequently corrected by legislation.[13]

The tax has raised just as intricate problems of the nature of the wife's estate in community property as it has in dower. In California the widow is compelled to pay the tax because her interest during the life of her husband is considered to be a mere expectancy, and the husband is said to have absolute title.[14] In other community states, however, it is held that for the sake of expediency the law makes the husband controlling agent of the property but does not vest absolute title in him.[15] In such jurisdictions the wife's interest is regarded as being similar to that of a partner, or as forming a part of the marriage contract. The effect of such decisions is to keep her interests out of the taxable class.[16]

The proceedings to collect the tax have also brought up some very interesting questions concerning conveyances.[17] A very recent case bearing on this subject is *Matter of the Estate of John C. Klatze* in the New York Court of Appeals (1915) 54 N. Y. L. J. 235. In this case a husband attempted to create a tenancy by entirety, by conveying to himself and his wife. The court decided that the effect of the conveyance was to make a tenancy in common and that consequently the widow was liable to pay a tax for succession to half of the estate. The fact that tenancy by entirety still exists in New York, and the further fact that the enabling acts make it possible for the husband and wife to convey to each other, did not warrant the court giving effect to the intentions of the husband. Making the conveyance under the enabling acts abrogated the unity of husband and wife which is essential to the

[11] *In re* Starbuck's Estate (N. Y. 1910) 137 App. Div. 866, aff'd. 201 N. Y. 531.

[12] Washburn, Real Property (6th ed.) 151, 157.

[13] N. Y. Laws, 1911, c. 732, § 243.

[14] Estate of Moffitt (1908) 153 Cal. 359. If the husband has absolute title, it is difficult to understand why he is held to succeed to his wife's share on her death. An unsatisfactory explanation of this point is attempted in *In re* Burdick (1896) 112 Cal. 387. In this case there is a splendid dissenting opinion in support of the contention that the wife has a property interest.

[15] Warburton *v.* White (1900) 176 U. S. 484-494; see 11 Columbia Law Rev., 668.

[16] Kohny *v.* Dunbar (1912) 21 Idaho 258; Succession of Marsal (1907) 118 La. 211. The last case goes beyond the others and exempts usufruct also.

[17] The statutes are usually framed so as to include gifts or conveyances, although complete and irrevocable, in contemplation of death. *In re* Birdsall's Estate (N. Y. 1897) 22 Misc. 180; or where enjoyment and possession has been postponed until the death of the grantor. People *v.* Estate of Moir (1904) 207 Ill. 180. The tax is not applicable, however, where there has been a valid consideration for the conveyance, Matter of Hess (N. Y. 1906) 110 App. Div. 476, aff'd. 187 N. Y. 554; Lamb's Estate *v.* Morrow (1908) 140 Iowa 89.

estate.[18] And it would be an anomaly to say that for the sake of conveying the husband and wife are separate persons, but for the purpose of receiving the identical conveyance they are a unit. Furthermore, at common law a husband could not convey to his wife,[19] and therefore, in order to create an estate by entirety, it was necessary to have the conveyance made to them by a third party. While this is only a matter of procedure for the creation of the estate, it has been held that the same rule is to be followed to-day;[20] and this seems logical, for a man cannot convey to himself.[21] Had the courts in the principal case decided that an estate by entirety was created, they would have established an easy method for escaping the inheritance tax.[22] Because in such an event, the wife would have taken as survivor and not derivatively.[23] The result reached is supported by authority,[24] and is in line with the policy adopted by the majority of courts in these cases, which is to prevent the avoidance of the tax by subterfuge, where this can be accomplished without doing violence to recognized theories of real property law.

AUCTION SALES.—The auction is by no means peculiarly an Anglo-Saxon institution. Although its origin is shrouded in the obscurity of antiquity, it can be traced back in a peculiar form to one of the customs of Babylonia,[1] and although greatly diversified in form is found in practically every existing country.[2] The fundamental principle of all auctions, including the customary form in the United States and England, is to secure the highest possible price by means of open competitive bidding.

When an auction is announced by means of hand-bills, posters or other forms of advertisements, the sound rule is that this amounts only to a declaration of intention on the part of the owner of the goods to be sold or the auctioneer that at the time and place named a sale is to be had of the articles described.[3] It has been suggested that such advertisement is an offer looking to the formation of a unilteral contract upon a person attending the sale and becoming the highest

[18]See Saxon *v.* Saxon (N. Y. 1905) 46 Misc. 202. This case holds that the effect was to create a joint tenancy, but this too seems wrong. The prerequisite of unity of time and title are disregarded. See Dressler *v.* Mulhern (1912) 136 N. Y. S. 1049; Pegg *v.* Pegg (1911) 165 Mich. 228.

[19]See 10 Columbia Law Rev., 776.

[20]Dressler *v.* Mulhern, *supra.*

[21]See Cameron *v.* Steves (1858) 9 N. Bruns. 141.

[22]The estate is not subject to the tax, *In re* Thompson's Estate (N. Y. 1914) 85 Misc. 291.

[23]Wilky *v.* Wilky (1914) 130 Tenn. 430.

[24]Wright *v.* Knapp (1915) 183 Mich. 656. This case held that the conveyance should be considered as made to strangers, and not to husband and wife.

[1]Herodotus, History, c. 196

[2]See Bateman, Auctions, 1-3; Anderson *v.* Wis. Central Ry. (1909) 107 Minn. 296.

[3]Payne *v.* Cave (1788) 3 T. R. 148.